SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Governmental Oversight and Productivity Committee

BILL:	CS/SB 798
SPONSOR:	Governmental Oversight and Productivity Committee and Senators Webster and Fasano
SUBJECT:	Public Records Exemption/Parental Notification
DATE:	April 26, 2005 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Maclure	JU	**Fav/1amendment**
2.	Rhea	Wilson	GO	**Fav/CS**
3.			JA	
4.			WM	
5.			RC	
6.				

I. Summary:

This public records exemption is linked to the CS/SB 1908, which provides for implementation of s. 22, Art.X, of the State Constitution, which authorizes the Legislature to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy.

The bill amends s. 390.01116, F.S., which currently makes confidential and exempt any information that could be used to identify a petitioning minor in documents related to the minor's petition for waiver of parental notification of termination of her pregnancy. The bill expands the scope of the exemption to make confidential and exempt any information that identifies the minor in a record held by a circuit or appellate court.

The exemption is made subject to the Open Government Sunset Review Act of 1995, and it will expire October 2, 2010, unless saved from repeal by the Legislature.

As the bill expands an existing exemption to a public records exemption, it must be enacted by a two-thirds vote of the membership present and voting.

This bill amends section 390.01116 of the Florida Statutes.

II. Present Situation:

Public Records

Florida has a long history of providing public access to the records of governmental and other public entities. The first law affording access to public records was enacted by the Florida

Legislature in 1909.[1] In 1992, Floridians voted to adopt an amendment to the State Constitution that raised the statutory right of public access to public records to a constitutional level.[2] Article I, s. 24 of the State Constitution, expresses Florida's public policy regarding access to public records by providing that:

> (a) Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

In addition to the State Constitution, the Public Records Law[3] specifies conditions under which public access must be provided to governmental records of the executive branch and other governmental agencies. Section 119.07(1)(a), F.S., requires:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee. . . .

The Public Records Law states that, unless specifically exempted, all agency[4] records are to be available for public inspection. The term "public record" is broadly defined to mean:

> All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.[5]

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.[6] All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.[7]

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[1] Ch. 5942, L.O.F. (1909).
[2] Article I, s. 24 of the State Constitution
[3] Chapter 119, F.S.
[4] The word "agency" is defined in s. 119.011(2), F.S., to mean ". . . any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." The Florida Constitution also establishes a right of access to any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except those records exempted by law or the state constitution.
[5] Section 119.011(1), F.S.
[6] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).
[7] *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

The State Constitution permits only the Legislature the authority to create exemptions to public records requirements.[8] Article I, s. 24 of the State Constitution, permits the Legislature to provide by general law for the exemption of records. A law that exempts a record must state with specificity the public necessity justifying the exemption and the exemption must be no broader than necessary to accomplish the stated purpose of the law.[9] Additionally, a bill that contains an exemption may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.[10]

There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes certain records confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[11] If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency is not prohibited from disclosing the record in all circumstances.[12]

The Open Government Sunset Review Act of 1995[13] states that an exemption may be created or expanded only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption. The three statutory criteria are if the exemption:

1) allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;

2) protects information of a sensitive personal nature concerning individuals, the release of which would be defamatory or cause unwarranted damage to the good name or reputation of such individuals, or would jeopardize their safety; or

3) protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information that is used to protect or further a business advantage over those who do not know or use it, the disclosure of which would injure the affected entity in the marketplace.[14]

The Open Government Sunset Review Act of 1995 provides for the systematic review, through a 5-year cycle ending October 2nd of the 5th year following enactment, of an exemption from the

[8] Article I, s. 24(c) of the State Constitution.
[9] *Memorial Hospital-West Volusia v. News-Journal Corporation*, 729 So. 2d 373, 380 (Fla. 1999); *Halifax Hospital Medical Center v. News-Journal Corporation*, 724 So. 2d 567 (Fla. 1999).
[10] Art. I, s. 24(c) of the State Constitution.
[11] Attorney General Opinion 85-62.
[12] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).
[13] Section 119.15, F.S.
[14] Section 119.15(4)(b), F.S.

Public Records Act or the Public Meetings Law. Each year, by June 1, the Division of Statutory Revision of the Joint Legislative Management Committee is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.

While the standards in the Open Government Sunset Review Act appear to limit the Legislature in the process of review of exemption, one session of the Legislature cannot bind another.[15] The Legislature is only limited in its review process by constitutional requirements. In other words, if an exemption does not explicitly meet the requirements of the act, but falls within constitutional requirements, the Legislature cannot be bound by the terms of the Open Government Sunset Review Act. Further, s. 119.15(4)(e), F.S., makes explicit that:

> … notwithstanding s. 768.28 or any other law, neither the state or its political subdivisions nor any other public body shall be made party to any suit in any court or incur any liability for the repeal or revival and reenactment of any exemption under this section. The failure of the Legislature to comply strictly with this section does not invalidate an otherwise valid reenactment.

An exemption from disclosure requirements does not render a record automatically privileged for discovery purposes under the Florida Rules of Civil Procedure.[16] For example, the Fourth District Court of Appeal has found that an exemption for active criminal investigative information did not override discovery authorized by the Rules of Juvenile Procedure and permitted a mother *who was a party* to a dependency proceeding involving her daughter to inspect the criminal investigative records relating to the death of her infant.[17] The Second District Court of Appeal also has held that records that are exempt from public inspection may be subject to discovery in a civil action *upon a showing of exceptional circumstances* and if the trial court takes all precautions to ensure the confidentiality of the records.[18]

In *B.B.*, *infra*, at 34, the Court noted with regard to criminal discovery the following:

> In the context of a criminal proceeding, the first district has indicated that "the provisions of Section 119.07, Florida Statutes, are not intended to limit the effect of Rule 3.220, the discovery provisions of the Florida Rules of Criminal Procedure," so that a public records exemption cannot limit a criminal defendant's access to discovery. *Ivester v. State*, 398 So.2d 926, 931 (Fla. 1st DCA 1981). Moreover, as the Supreme Court just reiterated in *Henderson v. State*, No. 92,885, 745 So.2d ----, 1999 WL 90142 (Fla. Feb. 18, 1999), "we do not equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially created rules of procedure." Slip op. at 6, --- So.2d ---- (quoting *Wait v. Florida Power & Light Co.*, 372 So.2d 420, 425 (Fla.1979)).

In a footnote, (*B.B.*, *infra*, at 34 n. 4) the Court also noted:

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[15] *Straughn v. Camp*, 293 So.2d 689, 694 (Fla. 1974)
[16] *Department of Professional Regulation v. Spiva*, 478 So.2d 382 (Fla. 1st DCA 1985).
[17] *B.B. v. Department of Children and Family Services*, 731 So.2d 30 (Fla. 4th DCA 1999).
[18] *Department of Highway Safety and Motor Vehicles v. Krejci Company Inc.*, 570 So.2d 1322 (Fla. 2d DCA 1990).

> We note that section 119.07(8), Florida Statutes (1997), provides that section 119.07 is "not intended to expand or limit the provisions of Rule 3.220, Florida Rules of Criminal Procedure, regarding the right and extent of discovery by the state or by a defendant in a criminal prosecution...."

Under s. 119.10, F.S., any public officer violating any provision of this chapter is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. In addition, any person willfully and knowingly violating any provision of the chapter is guilty of a first degree misdemeanor, punishable by potential imprisonment not exceeding one year and a fine not exceeding $1,000. Section 119.02, F.S., also provides a first degree misdemeanor penalty for public officers who knowingly violate the provisions of s. 119.07(1), F.S., relating to the right to inspect public records, as well as suspension and removal or impeachment from office.

Parental Notice of Abortion Act - Section 390.01115, F.S., the Parental Notice of Abortion Act, was enacted by s. 1, ch. 99-322. The act required a physician to give at least 48 hours' actual notice to one parent or to the legal guardian prior to terminating the pregnancy of a minor. Exceptions were provided. Under s. 390.01116, F.S., when a minor petitions a circuit court for a waiver of the notice requirements pertaining to a minor seeking to terminate her pregnancy, any information in documents related to the petition which could be used to identify the minor is confidential and exemption from s. 119.07(1), F.S., and s. 24(a), Art. I of the State Constitution. The Florida Supreme Court, however, found s. 390.01115, F.S., to be unconstitutional in 2003.[19]

Constitutional Amendment 1 (2004) - Under Article XI, s. 1 of the State Constitution, amendments to the constitution may be proposed by joint resolution agreed to by three-fifths of the membership of each house of the Legislature. The 2004 Legislature passed HJR 1 proposing an amendment to be placed on the ballot for the creation of s. 22 in Article X of the State Constitution, to create an exception to the right of privacy for a minor who seeks an abortion.

> Section 22. Parental notice of termination of a minor's pregnancy.--
> The Legislature shall not limit or deny the privacy right guaranteed to a minor under the United States Constitution as interpreted by the United States Supreme Court. Notwithstanding a minor's right of privacy provided in Section 23 of Article I, the Legislature is authorized to require by general law for notification to a parent or guardian of a minor before the termination of the minor's pregnancy. The Legislature shall provide exceptions to such requirement for notification and shall create a process for judicial waiver of the notification.

This amendment was approved by 4.6 million voters in the 2004 General Election.

Termination of Pregnancy - Section 390.0111, F.S., prohibits the termination of a pregnancy at any time by anyone other than a physician licensed under ch. 458, F.S., or ch. 459, F.S. Under s. 797.03, F.S., it is unlawful for any person to perform or assist in performing an abortion, except in an emergency care situation, other than in a licensed abortion clinic, licensed hospital, or physician's office.

[19] *North Florida Women's Health and Counseling Services, Inc., et al.*, 866 So.2d 612 (Fla. 2003).

According to the Office of Vital Statistics in the Department of Health, 89,995 pregnancies were terminated in Florida in 2003. The number of minors who had pregnancies terminated is unknown.

Child Abuse/Domestic Violence - Chapter 39, F.S., provides for judicial proceedings relating to children. Section 39.0015, F.S., defines the term "child abuse" and s. 39.01, F.S., defines "sexual abuse of a child."

Case Law on Abortion Regulations - In 1973, the landmark case of *Roe v. Wade* established that restrictions on a woman's access to secure an abortion are subject to a strict scrutiny standard of review. In *Roe*, the Court determined that a woman's right to have an abortion is part of the fundamental right to privacy guaranteed under the Due Process clause of the Fourteenth Amendment of the federal constitution, justifying the highest level of review.[20]

In 1979, the Court declined to extend an adult's fundamental right of privacy to minors in the case of *Bellotti v. Baird*.[21] Although children are provided identical constitutional protections in certain areas of law to that of adults, the Court reasoned, differential treatment is justified when necessary to protect the unique vulnerability of children, in light of their incapacity to make critical decisions at the same maturity level as adults.[22] The Court additionally acknowledged the importance of judicial deference to the parental role.[23]

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court relaxed the standard of review in abortion cases involving adult women from strict scrutiny to unduly burdensome, while still recognizing that the right to an abortion emanates from the constitutional penumbra of privacy rights.[24] In *Planned Parenthood*, the Court determined that prior to fetal viability, a woman has the right to an abortion without being unduly burdened by government interference.[25]

The unduly burdensome standard, generally considered to be a hybrid between strict scrutiny and intermediate level scrutiny, shifted the Court's focus to whether a restriction creates a substantial obstacle to access. This is the prevailing standard today applied in cases in which abortion access is statutorily restricted.

However, the undue burden standard was held not to apply in Florida. The 1999 Legislature passed a parental notification law, the Parental Notice of Abortion Act, requiring a physician to give at least 48 hours of actual notice to one parent or to the legal guardian of a pregnant minor before terminating the pregnancy of the minor. Although a judicial waiver procedure was included, the act was never enforced.[26] In 2003, the Florida Supreme Court[27] ruled this legislation unconstitutional on the grounds that it violated a minor's right to privacy, as expressly

[20] 410 U.S. 113, 114, 152 (1973).
[21] 443 U.S. 622 (1979).
[22] *Id.* at 623.
[23] *Id.*
[24] 505 U.S. 833, 834 (1992).
[25] *Id.* at 837.
[26] *See* s. 390.01115, F.S.
[27] *North Florida Women's Health and Counseling Services, Inc., et al., v. State of Florida*, 866 So.2d 612, 619 (Fla. 2003)

protected under Article I, s. 23 of the State Constitution.[28] Citing the principle holding of *In re T.W.*,[29] the court reiterated that, as the privacy right is a fundamental right in Florida, any restrictions on privacy warrant a strict scrutiny review, rather than that of an undue burden. Here, the court held that the state failed to show a compelling state interest.[30]

Parental Notification Laws in Other States - At least 16 states other than Florida have enacted parental notification laws which require that a pregnant minor's parent be notified before the pregnant minor may undergo a termination of her pregnancy. In five other states, parental notice laws have been found unconstitutional.[31]

Courts have generally upheld parental notification laws where they include:

- A health exception and a death exception;
- Language providing for confidentiality and expediency in judicial bypass proceedings, both at the trial and appellate levels; and
- A sufficient judicial bypass procedure.

Prior to a court's examination of whether a particular regulation meets the undue burden test, the state must show that the statute contains a sufficient health and death exception.[32] A health exception is considered to be as requisite for minors as it is for adult women.[33] Additionally, critical to the court's analysis is whether an adequate judicial bypass procedure is in place. The *Bellotti* court established required criteria for an adequate judicial bypass to include:

- Permitting a bypass where the minor demonstrates that she is sufficiently mature and well-informed to make the abortion decision independent of her parents;
- Permitting a bypass where the minor establishes that the abortion would be in her best interests;
- Providing for an anonymous hearing; and
- Requiring that a waiver hearing be expedited.[34]

If so, the judicial bypass generally passes constitutional muster, as demonstrated by the Court's holdings in challenges to state abortion restrictions on minors in Pennsylvania, Missouri, Ohio, and Montana.[35]

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[28] The constitutional right of privacy provision reads: "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law."
[29] 551 So.2d 1186, 1192 (Fla. 1989).
[30] *North Florida Women's Health and Counseling Services, supra* note 8, at 642.
[31] These are: Colorado, Illinois, Montana (judicial bypass provisions were upheld but other portions found unconstitutional), New Hampshire, and New Jersey.
[32] *Stenberg v. Carhart*, 530 U.S. 914 (2000).
[33] *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 923 (9th Cir. 2004).
[34] *Bellotti*, *supra* note 2, at 633, 634.
[35] *See, e.g., Planned Parenthood*, *supra* note 5 (PA.); *Planned Parenthood Association of Kansas City, MO, Inc. v. Ashcroft*, 462 U.S. 476 (1983) (MO); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) (OH); *Lambert v. Wicklund*, 520 U.S. 292 (1997) (MN).[35]

III. Effect of Proposed Changes:

The bill amends s. 390.01116, F.S., which currently makes confidential and exempt any information that could be used to identify a petitioning minor in *documents* related to the minor's petition for waiver of parental notification of termination of her pregnancy. The bill expands the scope of the exemption to include any information that identifies the minor in a record held by a circuit or appellate court. Under the Public Records Act, "record" is a defined term that includes more than just "documents."

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

The bill expands an existing exemption to public records requirements. As such, the exemption is subject to the requirement of s. 24, Art. I of the State Constitution, that the bill be enacted by a two-thirds vote of the members present and voting.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Summary of Amendments:

None.